

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

15 UNITED STATES OF AMERICA,) 3:06-cr-00073-HDM
16 Plaintiff,) 3:16-cv-00073-HDM
17 vs.) ORDER
18 WILLIAM EDWARD ARMSTRONG,)
19 Defendant.)

On February 16, 2016, defendant filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 32). On March 14, 2016, the government filed a response (ECF No. 36), and on March 21, 2016, the defendant filed a reply (ECF No. 37). On March 23, 2016, and June 3, 2016, the court stayed proceedings pending decisions by the Supreme Court and Ninth Circuit Court of Appeals (ECF Nos. 38 & 39). On August 3, 2016, the court lifted the stay (ECF No. 40).

1 On September 9, 2016, defendant filed an "Emergency Motion for
2 Status Conference" (ECF No. 41). At a status conference on
3 September 28, 2016, the court indicated that it was inclined to
4 further stay proceedings pending the Supreme Court's decision in
5 *Beckles v. United States*, No. 15-8544. The court indicated that a
6 stay would not be prejudicial because even on the merits defendant
7 likely was not entitled to § 2255 relief. Defendant opposed the
8 stay and asked the court to proceed to decide his case on the
9 merits. (See ECF No. 44).

10 On March 6, 2017, the court ordered the defendant to show
11 cause why *Beckles* did not require the court to deny his motion. On
12 April 20, 2017, defendant filed a motion for voluntary dismissal of
13 his § 2255 motion pursuant to Federal Rule of Civil Procedure
14 41(a)(2) (ECF No. 48). The court initially granted the motion on
15 April 21, 2017, but vacated its order after the government filed a
16 motion to reconsider (ECF No. 50). Defendant has responded to the
17 motion to reconsider (ECF No. 53), and the government has replied
18 (ECF No. 55).

19 While the parties disagree on the applicability of Rule 41(a)
20 to § 2255 proceedings, the court need not decide the issue. Even
21 assuming Rule 41(a)(2) can be applied, it is within the court's
22 discretion whether to grant a dismissal under that rule. See Fed.
23 R. Civ. P. 41(a)(2) ("[A]n action may be dismissed at the
24 plaintiff's request only by court order, on terms that the court
25 considers proper."); *Stevedoring Servs. of Am. v. Armilla Int'l
B.V.*, 889 F.2d 919, 921 (9th Cir. 1989) ("[A] motion for voluntary
27 dismissal under Rule 41(a)(2) is addressed to the district court's
28 sound discretion . . ."). "The purpose of the rule is to permit

1 a plaintiff to dismiss an action without prejudice so long as the
2 defendant will not be prejudiced, or unfairly affected by
3 dismissal." *Id.* (internal citations omitted). The court concludes
4 that, under the circumstances of this case, the government would be
5 unfairly affected by a dismissal of defendant's petition without
6 prejudice. Not only was the government required to respond to
7 defendant's motion, but defendant sought a resolution of his motion
8 well before the Supreme Court's decision in *Beckles* - even after
9 the court had indicated it would likely be denied. If the court
10 had proceeded as defendant then wished, and the motion had been
11 denied, defendant would not have been able to file any second or
12 successive motion - and the government would not be required to
13 respond to any such motion - unless defendant first received
14 authorization from the Court of Appeals. If the court allows
15 voluntary dismissal at this juncture, however, the government may
16 have to relitigate whether any future motions filed by defendant
17 are subject to the second or successive limitation of 28 U.S.C. §
18 2255(h). The court therefore concludes it should decide
19 defendant's motion on its merits now and therefore **DENIES** the
20 motion for voluntary dismissal. The government's motion to
21 reconsider is accordingly **GRANTED**.

22 In his § 2255 motion, defendant seeks relief based on *Johnson*
23 *v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme
24 Court held that the residual clause in the ACCA's definition of
25 "violent felony" is unconstitutionally vague. Defendant was not
26 charged or sentenced under the ACCA. Rather, he was found to be a
27 career offender under U.S.S.G. § 4B1.1. Under § 4B1.1, a defendant
28 qualifies as a career offender if:

1 (1) the defendant was at least eighteen years old at the
2 time the defendant committed the instant offense of
3 conviction; (2) the instant offense of conviction is a
4 felony that is either a crime of violence or a controlled
5 substance offense; and (3) the defendant has at least two
6 prior felony convictions of either a crime of violence or
7 a controlled substance offense.

8 At sentencing, the court determined that defendant qualified as a
9 career offender because he had two prior crimes of violence and his
10 instant offense was a crime of violence. All three crimes were the
11 same: bank robbery in violation of 18 U.S.C. § 2113(a). The
12 definition of "crime of violence" for purposes of the career
13 offender guideline includes a residual clause that is identical to
14 that in the ACCA. See U.S.S.G. § 4B1.2(a). Defendant argued that
15 *Johnson* invalidated this residual clause, that bank robbery in
16 violation of § 2113(a) qualified as a "crime of violence" only
17 under the residual clause, and that he is therefore entitled to
18 relief.

19 On March 6, 2017, the United States Supreme Court determined
20 that *Johnson* does not apply to the Guidelines. *Beckles v. United*
21 *States*, 580 U.S. – , 137 S. Ct. 886 (Mar. 6, 2017). As defendant's
22 claim for relief depends on *Johnson* applying to the Guidelines and
23 the Supreme Court has held *Johnson* does not apply to the
24 Guidelines, defendant is not entitled to any relief. Defendant's §
25 2255 motion (ECF No. 32) therefore must be and hereby is **DENIED**.

26 The standard for issuance of a certificate of appealability
27 calls for a "substantial showing of the denial of a constitutional
28 right." 28 U.S.C. § 2253(c). The Supreme Court has interpreted 28

1 U.S.C. § 2253(c) as follows:

2 Where a district court has rejected the
3 constitutional claims on the merits, the
4 showing required to satisfy §2253(c) is
5 straightforward: The petitioner must
6 demonstrate that reasonable jurists would find
7 the district court's assessment of the
8 constitutional claims debatable or wrong. The
9 issue becomes somewhat more complicated where,
10 as here, the district court dismisses the
11 petition based on procedural grounds. We hold
12 as follows: When the district court denies a
habeas petition on procedural grounds without
reaching the prisoner's underlying
constitutional claim, a COA should issue when
the prisoner shows, at least, that jurists of
reason would find it debatable whether the
petition states a valid claim of the denial of
a constitutional right and that jurists of
reason would find it debatable whether the
district court was correct in its procedural
ruling.

13 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v.*
14 *Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000). The Supreme Court
15 further illuminated the standard for issuance of a certificate of
16 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The
17 Court stated in that case:

18 We do not require petitioner to prove, before
19 the issuance of a COA, that some jurists would
grant the petition for habeas corpus. Indeed,
20 a claim can be debatable even though every
jurist of reason might agree, after the COA has
been granted and the case has received full
consideration, that petitioner will not
prevail. As we stated in *Slack*, "[w]here a
district court has rejected the constitutional
claims on the merits, the showing required to
satisfy § 2253(c) is straightforward: The
petitioner must demonstrate that reasonable
jurists would find the district court's
assessment of the constitutional claims
debatable or wrong."

26 *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484).

27 The court has considered the issues raised by defendant with
28 respect to whether they satisfy the standard for issuance of a

1 certificate of appeal and determines that none meet that standard.
2 The court will therefore deny defendant a certificate of
3 appealability.

4 In accordance with the foregoing, the government's motion to
5 reconsider (ECF No. 50) is **GRANTED**. The defendant's motion for
6 voluntary dismissal (ECF No. 48) and his motion pursuant to § 2255
7 (ECF No. 32) are **DENIED**. The court further denies defendant a
8 certificate of appealability.

9 **IT IS SO ORDERED.**

10 DATED: This 26th day of June, 2017.

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13 UNITED STATES DISTRICT JUDGE
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